89-712

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

STATE OF ALABAMA,

PETITIONER,

V.

ROBIN DEWAYNE HELMS,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA AND APPENDIX

OF

DON SIEGELMAN
ATTORNEY GENERAL

AND

JOSEPH G.L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

ADDRESS OF COUNSEL:

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Alabama State House
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QUESTIONS PRESENTED

1. Should the language of search warrants be lifted out of context, given hypertechnical readings and invalidated on the basis of abstract considerations?

2. To what extent does the rule of Ybarra v. illinois (444 U.S. 85 [1979]) holding that a search warrant for a public establishment does not ipso facto authorize the search of casual patrons of the establishment, who are not mentioned in the warrant apply to warranted searches of the occupants of private dwellings?

THE PARTIES

In the Circuit Court of Dallas County, Alabama, the COurt of Criminal Appeals of Alabama, and the Supreme COurt of Alabama, the parties were Robin Dewayne Helms, who is Respondent herein, as Defendant, Appellant and Respondent, respectively, and the State of Alabama, who is Petitioner herein, as Plaintiff, Appellee, and Petitioner respectively.

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

OPINIONS AND ORDERS BELOW

The opinion, issued by the Court of Criminal Appeals of Alabama on May 12, 1989, reversing Respondent Helms' conviction, remanding the cause and ordering the suppression of evidence found pursuant to a valid search warrant, is not yet reported, but will be reported as:

Helms v. State ___ So.2d.___ (Ala. Crim. App, 1989)

A copy of the same is submitted as Appendix "A" to this petition.

The order of the Supreme Court of Alabama of September 1, 1989, denying Your Petitioner State's Petition for a writ of certiorari is not yet reported but will be memorialized as part of the official report of the Court of Appeals' opinion, above. A copy of the same is submitted as Appendix "B" to this Petition.

The proceedings in this cause were stayed on September 7, 1989, pending this petition. A copy of said order is submitted as Appendix C" to this petition.

JURISDICTION

The order of the Supreme Court of Alabama was issued on September 1, 1989, and this petition is filed within sixty

(60) days of said date. This Honorable Court's Jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Court of Criminal Appeals of Alabama claimed that its decision was mandated by the Fourth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States. Your Petitioner is making a claim under the same said provisions. Said constitutional provisions read:

"AMENDMENT IV

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"AMENDMENT XIV

"Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

No statutory provisions are at issue in this proceeding. Respondent Helms was convicted under Section 20-2-70(a), Code of Alabama, 1975. A copy of the same is submitted as Appendix "D" to this petition.

STATEMENT OF THE CASE

The events which led to the prosecution and conviction of Respondent Helms began on June 5, 1987, when a Dallas County, Alabama, Deputy Sheriff submitted a search warrant affidavit to a judge of the Circuit Court. On the basis of the affidavit, the Circuit Judge issued a search warrant for a residential apartment, commanding the search for, "... Cocaine, marijuana and other illegal drugs...." (R.p. 239) The Court directed the officers "... to search forthwith the residence .... and the persons, if you find the same present ...."[1] (Ibid.) (R.pp 239-240) A full copy of

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1. The issues in this case relate entirely to this underlined language.

the warrant appears at pages 40-41 of Appendix "A" of this petition.

The warrant was executed the same day it was issued. At the apartment the officers, found Respondent Helms, whom they knew casually resided there. After searches of the apartment and Respondent Helms' vehicle produced no contraband, the officers took the Respondent into a private bedroom and undertook a strip search of his person. This search revealed a quantity of cocaine hidden in the Respondent's underware. No one else was searched. (R. pp. 4-34)

On the basis of the cocaine thus found, which the Trial Court refused to suppress (R.p 223), Respondent Helms was convicted of a violation of Section 20-2-70(a) Code of Alabama, 1975 (Appendix "D") and sentenced to ten years imprisonment. (R.pp 64-150 and 226-238)

Respondent Helms appealed to the Court of Criminal Appeals of Alabama. On May 12,1989, the Court of Appeals reversed the Appellant's conviction. The Court found that under the Aguilar-Spinelli[2] standards, the affidavit was sufficient to provide probable cause for the search. (Mns. op., Appendix "A" pages 34-38) However not withstandng the warrant magistrate's order to search "...the persons, if you find the same present ...", the Court of Appeals found the search of the Respondent's person illegal. The Court of Appeals reasoned:

> " ... The warrant issued in the instant case authorized the search of 'the residence above described for the property and the

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2. Aguilar v. Texas 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964); Spinelli v. United States 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969). But see Illinois v. Gates 462 U.S. 213,238, 76 L.Ed.2d 527,548, 103 S.Ct. 2317 (1983) and Massachusetts v. Upton 466 U.S. 727,732, 80 L.Ed.2d 721,726, 104 S.Ct.2855 (1984).

> persons[sic].'Based upon Ybarra [v. Illinois 444 U.S. 85, 62 L.Ed. 2d 238, 100 S.Ct. 338 (1978)] and the aforementioned Alabama cases, the wording "and the persons" [sic] contained in the warrant was too broad to justify the search of appellant's person, since no persons were named or described in the warrant...." (Ibid, pp. 42-43)

The State applied for rehearing pointing out:

1. Due to the nature of the contraband sought, the warrant magistrate had a substantial basis for believing that it might be concealed on the person of any occupant who was present.

2. The language "... the persons, if you find the same present...." obviously referred to occupants who were present, and the Court of Appeals, reading "the persons" out of context and interpreting the language to order the search of anyone who was present, violated this Court's long standing

policy against giving search warrants abstract, hypertechnical readings.

3. The Respondent was an occupant who was present, and he was the only person who was searched.

The Court of Appeals denied the State's Application for rehearing, and the State sought review from the Alabama Supreme Court on the same points, but the same was denied, with dissent, on September 1, 1989. (Appendix "B")

STATEMENT OF THE FACTS

I.

ON THE MOTION TO SUPPRESS

On June 5, 1987, Deputy W. H. Duke, an Investigator with the Dallas County, Alabama, Sheriff's Department, submitted an affidavit for a search warrant to Honorable Charles Thigpen, a

Judge of the Circuit Court of Dallas County, Alabama. Investigator Duke swore that a confidential informer, who had given Duke accurate information in the past which had led to arrests and convictions, had told him that he had observed marijuana, cocaine and other illegal drugs at an apartment identified as #12G Chanticleer Apartments, in Selma, Dallas County, Alabama. The information was less than twenty-four hours old. Therefore, Duke concluded, that these controlled substances were being concealed at this apartment. The Honorable Circuit Judge issued the warrant, commanding the search of said apartment and occupants who were present for said contraband. (R.pp.239-240)

It is clear that Selma and Dallas County law enforcement and Respondent

Helms' probation officer[3] knew that the Respondent was dealing in cocaine. (R.p.232) The testimony at the suppression hearing showed that through surveillance, the investigators were aware that Helms had some relationship with this apartment. (R.pp.6-7) Indeed, it appeared without conflict that the apartment belonged to one Rene Macombs, and Respondent Helms often stayed with Ms. Macombs, although their relationship was not such that he was free to stay there when she was out of town. (R.pp.44 and 49)

On the day the warrant was issued, it was executed by Dallas County Deputies, assisted by the Respondent's probation officer. Helms was at the apartment and was frisked; nothing was found.

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3. The Appellant was on probation following an arson conviction. (R.pp.40-41 and 231-233)

The investigators then searched the apartment and found no controlled substances. They then searched the Respondent's vehicle and again no contraband was discovered. The investigators then required the Respondent to submit to a strip search. Incident to this strip search Respondent Helms discarded a grey cloth bag, which was hidden in his underware. This was seized by Investigator Harris Huffman. Inside the bag were two clear plastic bags containing white powder. No one else was searched. (R.pp.4-34)

II.

ON THE TRIAL

On the trial of the case, the facts recited above were reproven by the State. (R.pp.64-150)

In addition, it was proven that the material in the grey cloth bag discarded by Respondent Helms was cocaine. (R.pp. 66, 73-78, 97 and 134-137)

SUMMARY OF THE ARGUMENT

1. The policy under the Fourth Amendment of giving preference to searches under warrants is well established. E.g. United States v. Chadwick 433 U.S. 1,9, 53 L.Ed.2d 538,574, 97 S.Ct. 2476 (1977) In accord with that policy, this Court has forbidden giving search warrant affidavits hypertechnical readings. United States v. Ventresca 380 U.S. 102, 108ff, 13 L.Ed.2d 684,689ff, 85 S.Ct. 741 (1965); Illinois v Gates 462 U.S. 213,236, 76 L.Ed.2d 527,547, 103 S.Ct. 2317(1983). This Court has also established a general policy of refusing

to invalidate official acts on the basis of abstract possibilities. E.g. Alderman v. United States 394 U.S. 165, 171-172, 22 L.Ed.2d 176,185-186, 89 S.Ct. 961 (1969); United States v. Ventresca, above, 380 U.S. 102,108, 13 L.Ed.2d 684,689; and New York v. Ferber 458 U.S. 747, 73 L.Ed.2d 1113, 102 S.Ct. 3348 (1982). In this case, the Alabama Appellate Courts, by lifting the phrase "the persons" out of context, giving it a hypertechnical and unnatural reading and an abstract application, violated all these policies.

2. Although Ybarra v. Illinois (444 U.S. 85, 62 L.Ed.2d 238, 100 S.Ct. 338[1979]) does not have any application to this case, the Alabama Appellate Courts applied it. This Court has never addressed the issue of the applicability of Ybarra to occupants of private dwellings. Because of the obvious differences

between public establishments and private dwellings, this court should address this issue. See United States v McLaughlin 851 F.2d 283,286-287(9th Cir. 1988)

ARGUMENT

I.

IN RE: GIVING THE SEARCH WARRANT AN UNNATURAL, HYPERTECHNICAL READING AND AN ABSTRACT APPLICATION.

REASON FOR GRANTING THE WRIT: CONFLICT WITH THE CONTROLLING DECISIONS OF THE SUPREME COURT

In this case, the Alabama Appellate Courts violated one of the most basic policies under the Fourth Amendment: The preference for search

warrants. The reasons for this policy are well known, and were succinctly stated in United States v. Chadwick (433 U.S. 1, 53 L.Ed.2d 538, 97 S.Ct. 2476 [1977]). This Honorable Court has also long recognized that a necessary implication of such a policy is that warrants and searches pursuant to them ought not be invalidated, except where absolutely necessary. This logically flows from the preference for warrants and is mandated by practical considerations as well. Obviously, if officers, in seeking warrants, merely trade one set of problems and uncertainties for another, they will not be encouraged to proceed by warrant. As this Honorable Court observed in Illinois v Gates 462 U.S. 213,236, 76 L.Ed.2d 527,547, 103 S.Ct. 2317(1983):

> "...If the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the Warrant Clause that might develop at the time of the search...." (462 U.S. 213,236, 76 L.Ed.2d 527,547)

This was the policy which led this Court to overrule Aguilar v. Texas 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964)and Spinelli v. United States 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969). Illinois v. Gates, above, 462 U.S. 213,238, 76 L.Ed.2d 527,548, and Massachusetts v. Upton 466 U.S. 727,732,

80 L.Ed.2d 721,726, 104 S.Ct.2855 (1984).[4] In accordance with

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4 "...The Massachusetts court apparently viewed Gates as merely adding a new wrinkle to this two-pronged test...."(466 U.S.727,730, 80 L.Ed.2d 721,726).

"We think that the Supreme Judicial Court of Massachusetts misunderstood our decision in Gates. We did not merely refine or qualify the 'two-pronged test.' We rejected it as hypertechnical and divorced from 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act...." (466 U.S.727,732, 80 L.Ed.2d 721,726).

Of course, as noted, the Alabama Appellate Courts followed the "two-pronged test" of Aguilar and Spinelli in this case.

this policy, this Court has long condemned giving warrant affidavits hypertechnical readings. United States v. Ventresca 380 U.S. 102, 108, 13 L.Ed.2d 684,689, 85 S.Ct. 741 (1965); Illinois v Gates, above, 462 U.S. 213,236, 76 L.Ed.2d 527,547.

In the instant case, the Alabama Appellate Courts gave the affidavit and the warrant hypertechnical readings. The affidavit survived; the warrant did not.

The Alabama Courts found probable cause to believe that controlled substances were being concealed at the apartment, even under the Aguilar -Spinelli test. If there.was contraband in the apartment, there was a high probability that the occupants put it there and, since drugs can easily be and commonly

are concealed on the person, it stands to reason that the persons of the occupants who were present were places where the contraband might be concealed.

Therefore, the magistrate had "a substantial basis for concluding that a search" of the persons of the occupants who were present on the premises would produce relevant contraband. Illinois v. Gates, above, 462 U.S. 213,236, 76 L.Ed.2d 527,547 and Massachusetts v. Upton, above, 466 U.S. 727,732-733, 80 L.Ed.2d 721,727. It is undisputed that the magistrate ordered such searches. The language the magistrate used was: "...search... the persons, if you find the same present...." (R.p.239).

The Alabama Appellate Courts read this language as authorizing the search of every one who was present. This was accomplished by reading "the persons" out of the context of the phrase, "the

persons, if you find the same present" and out of the context of the whole warrant and giving the language a hypertechnical reading.

In addition to giving the warrant a hypertecnnical reading, the Alabama Appellate Courts gave it an unnatural reading. If "the persons" referred to all persons who were present, the warrant's language comes out: "Search all the persons present, if you find the same present." Which is, of course, "gibberish." The natural reading of the language in the context of the warrant clearly shows that "the persons" refers to the occupants, and language comes out: "Search the occupants of the apartment, if you find the same present."

The Alabama Appellate Courts complained that the warrant did not name or describe the persons to be searched, but a common-sense reading of the language

clearly shows that the persons to be searched were precisely described according to the factors giving rise to probable cause: The persons to be searched were those who were (1) occupants of the apartment and (2) present when the warrant was served. Obviously, the officers could have (and did), "...with reasonable effort, ascertain and identify the...[persons] intended...." Steele v United States 267 U.S.498,503, 69 L.Ed. 757,760, 45 S.Ct.414(1925)

In addition to giving the warrant's language an out-of-context, unnatural and hypertechnical reading, the Alabama Appellate Courts invalidated the search on purely abstract grounds. There was, as pointed out above, obvious probable cause to search the persons of the occupants of the apartment who were present, and it is undisputed that the magistrate ordered the search of such

persons. Finally, it is undisputed that the Respondent was a casual occupant of the apartment, who was present when the warrant was executed, and the Respondent was the only person searched. [5] Thus, even if the warrant could be construed to authorize the search of everyone present, the executing officers did not so understand or apply it. Thus, the Alabama Appellate Courts invalidated this search on the basis of an abstract consideration. In this, they again violated a basic constitutional policy of this Honorable Court. This Court has consistently refused to invalidate official acts on the basis of abstract possibilities. "...[T]he Fourth Amendment's

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[5] On entering the apartment the Respondent and a visitor were subjected to "pat downs" for weapons, but these produced neither weapons nor evidence and no issue was made of them at trial or on appeal.

commands, like all constitutional requirements, are practical and not abstract..." United States v.Ventresca, above, 380 U.S. 102,108, 13 L.Ed.2d 684,689. Compare, for example, New York v. Ferber 458 U.S. 747, 73 L.Ed.2d 1113, 102 S.Ct. 3348 (1982). [6] This is the basis for the standing doctrine under the Fourth Amendment. E.g. Alderman v. United States 394 U.S. 165, 22 L.Ed.2d 176, 89 S.Ct. 961 (1969) [7] and Rawlings

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6. "...The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. ..." (458 U.S. 747,767, 73 L.Ed.2d 1113,1129).

7. "...The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are agrieved solely by the introduction of damaging evidence ...." (394 U.S. 165,171-172, 22 L.Ed.2d 176,185-186.)

v.Kentucky 448 U.S. 98, 65 L.Ed.2d 633, 100 S.Ct. 2556(1980). The invalidation of this warranted search on purely abstract grounds is contrary to these authorities of this Honorable Court.

This Honorable Court has long recognized the Fourth Amendment's preference for searches under warrants. In pursuit of that policy, this Court has established rules which are designed to encourage police officers to seek warrants. These rules bore fruit in this case: These officers, having sufficient probable cause even under the strict Aguilar-Spinelli test, took their evidence to a judge and obtained a warrant. The warrant properly directed the search of the occupants of the apartment, if they were present. Under the warrant, the Respondent, an occupant who was present, was searched and evidence was found. Yet, that evidence was

suppressed, because an appellate court found that an isolated phrase of the warrant, when given an out-of-context, hypertechnical and unnatural reading, could be construed to command illegal searches, even though no such searches occurred. In doing this, the Alabama Appellate Courts ruled contrary to the clear teachings of this Honorable Court.

If the sound policies established by this Honorable Court and followed throughout the rest of the Country are to prevail in Alabama, this decision must be reversed. For this reason, we respectfully submit that the writ should issue.

II

IN RE: THE APPLICABILITY OF YBARRA V. ILLINOIS (444 U.S. 85 [1979]) TO SEARCHES OF THE OCCUPANTS OF PRIVATE PREMISES.

REASON FOR GRANTING THE WRIT: NOVEL QUESTION

Ybarra v Illinois (444 U.S. 85, 62 L.Ed.2d 238, 100 S.Ct.338 [1979])is so

far wide of the issues of this case,[8] that we are embarrassed to mention it. However, the Alabama Court of Criminal Appeals expressly based its decision on Ybarra, and, for that reason, we cannot leave it unmentioned.

Ybarra held that a search warrant for a public place does not ipso facto authorize the search of casual patrons of the establishment. There are obvious differences between the public establishments and private dwellings and between casual patrons and occupants. In Ybarra

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8. In Ybarra, officers executing a search warrant for a public tavern initiated the search by patting down the casual patrons of the establishment, who were not referenced in the affidavit or warrant, and found contraband on Ybarra, one of the patrons.

In the instant case, officers executing a search warrant for a private dwelling and the occupants who are present, after completing the search of the physical premises, subjected the Respondent, who was an occupant and present, to a strip search and found evidence to which the warrant was directed.

this Honorable Court observed that "... a person's mere propinquity to others suspected of criminal activity does not, without more, give rise to probable cause to search that person...." (444 U.S. 85,91, 62 L.Ed.2d 238,245), but in the case of an occupant of a private dwelling there is more than mere proximity. An occupant of a premises is in a position of at least some practical control of the premises. If, as here, there is probable cause to believe controlled substances are hidden on a premises, it is highly likely that an occupant has at least acquiesed therein.

Ybarra ought to be held inapplicable to the warranted searches of occupants of private dwellings for at least four reasons:

First, Justice Stewart's majority opinion in Ybarra strongly suggests that it would not have taken much to justify

a search of Ybarra.[9]

Second, where, as here, there is probable cause to believe that drugs are hidden on a private premises, it stands to reason that the occupants of the premises are probably involved therewith. It is a recognized fact that persons who are involved with drugs are often armed and under the influence of

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9. For example:

> " Upon entering the tavern, police did not recognize Ybarra and had no reason to believe that he had committed, was committing, or was about to commit any offense under state of federal law. Ybarra made no gestures indicative of criminal conduct, made no movements that might suggest an attempt to conceal contraband, and said nothing of a suspicious nature to the police officers. In short, the agents knew nothing in particular about Ybarra, except that he was present, along with several other customers, in a public tavern at a time when the police had reason to believe that the bartenter would have heroin for sale....'(444 U.S.85,93-94, 62 L.Ed.2d 238,247)

substances which destroy inhibitions and create feelings of paranoia and invincibility. Add to this, the necessarily antagonistic nature of the execution of a search warrant, and the potential for deadly violence is obvious. In Ybarra, the Honorable majority was unwilling to recognize this in the case of the casual patrons of a public establishment. Three Justices dissented in Ybarra, reaching the opposite conclusion on this point. This is a matter about which reasonable people may disagree, but, in the case of occupants of a private dwelling, it is difficult to see any basis for disagreement. In this situation at least a weapons search, like that in Ybarra should be permitted.

Third, in the case of a warranted search of a private dwelling for contraband which can be concealed on the

person, it would appear that the person of an occupant would be a place where the contraband could be concealed. Such being the case, the warrant itself would authorize the search.

Finally, the United States Court of Appeals for the Ninth Circuit has held that Ybarra does not apply to persons who are more than casually connected with the searched premises. United States v. McLaughlin 851 F.2d 283,286-287 (9th Cir, 1988).

This Honorable Court has never addressed this issue, and we respectfully submit that it ought to in this case.

CONCLUSION

In conclusion your Petitioner, the State of Alabama, respectfully submits that the Court of Criminal Appeals and Supreme Court Alabama, decided this case

in a manner which conflicts sharply with the teachings of this Honorable Court and resolved a novel legal question in a patently erroneous manner.

Therefore, Your Petitioner prays that this Honorable Court will issue the writ of certiorari and will review the matters complained of and reverse the decisions and opinion of the said Appellate Courts of Alabama.

Respectfully submitted,

DON SIEGELMAN
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BY:

_____

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APPENDIX

APPENDIX A

[STAMP]RELEASED, MAY 12, 1989
ALA. COURT OF CRIMINAL APPEALS,
MOLLIE JORDAN, CLERK

THE STATE OF ALABAMA-JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1988 - 89

2 Div. 687

Robin Dewayne Helms

v.

State

TAYLOR, PRESIDING JUDGE

The Appellant, Robin Dewayne Helms, was convicted of violating the Uniform Controlled Substances Act, and was sentenced to ten years' imprison-

ment. On appeal, he raises three issues, all of which deal with the validity of, first, the affidavit, then, the search warrant, and, finally, the resulting search.

I

Initially, appellant argues that the trial court erred in denying his motion to suppress the cocaine discovered in a strip search of his person because there was no basis for the reliability or credibility of the informant. Therefore, appellant contends, the affidavit was defective and no warrant should have been issued.

The affidavit in question reads as follows:

> "Before me, Charles Thigpen, Judge of the Circuit Court of Dallas County Selma, Alabama, the undersigned W. H. Duke, Investigator with the Dallas County Sheriff's Department, who is known to me, being duly sworn, deposes and says that there is now being concealed

certain property located in an apartment known as #12G Chanticleer Apartments, Selma, Alabama. The property being concealed is as follows:

"Cocaine, Marijuana and other illegal Drugs

'which constitutes legal evidence pertaining to Possession of Illegal Drugs and that the fact tending to establish the aforegoing grounds for issuing a search warrant are as follows:

"I, W. H. Duke, Investigator with the Dallas County Sheriff's Department have received information from a confidential reliable informant, whose information over a period of the last twelve months has led to narcotic arrest [sic] and convictions. That there is presently contained at this residence illegal drugs, to-wit: Cocaine, Marijuana and other illegal drugs. The aforesaid informant stated that during the past 24 hours he has visited the above described apartment and saw Cocaine, Marijuana, and other illegal drugs there. Said informant further states that he is familiar with the appearance of Cocaine and Marijuana and the substance at the premises is in fact Cocaine and Marijuana.

> This information was given to me by the informant within the past 24 hours prior to the making of this affidavit.
>
> " Based on all of the above information I have probable cause to believe and do believe that there is presently contained at the residence, illegal drugs."

The "totality-of- the circumstances" test articulated in Illinois v. Gates, 462 U.S. 213, 103 S,Ct. 2317, 76 L.Ed.2d 527 (1983), is the standard now used to evaluate probable cause based on an informant's tip:

> "The task of the issuing magistrate is simply to make a practical common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for ... conclude[ing]' that probable cause existed. Jones v. United States, 362 U.S., at 271. We

> are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from Aguilar and Spinelli."

Gates, 462 U.S. at 238-39. Despite this, vestiges of the two-pronged test established by the decisions in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), remain. As Judge Bowen wrote in Bishop v. State, 518 So.2d 829,831 (Ala. Cr. App. 1987):

> "Although the two-pronged test of Aguilar-Spinelli has been abandoned, it has not been forgotten. '[A]n informant's "veracity", "reliability," and "basis of knowledge" are all highly relevant in determining the value of his report' and are 'relevant considerations in the totality-of -the circumstances analysis that traditionally has guided probable-cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a

> tip, by a strong showing as to the other, or by some other indicia of reliability.' Gates, 462 U.S. at 230,233, 103 S.Ct. at 2838-29."

In the instant case, Investigator Duke's affidavit established the reliability of his informant, as well as the informant's basis of knowledge. This affidavit meets both the Gates "totality-of-the-circumstances" test and the two-pronged Aguilar-Spinelli test. Therefore, it was unnecessary for the officer to include any other information about his informant in the affidavit. Thus, the search warrant need not fail based of the reliability of the informant's information.

II

Appellant also contends that the trial court erred in failing to suppress the cocaine seized form his person because he was neither named nor

described in the search warrant. He further contends that the search of his person cannot be justified as a search incident to a lawful arrest because, at the time he was strip searched, no probable cause existed for his arrest. We, reluctantly, agree.

Section 15-5-3, Code of Alabama 1975, states that "A search warrant can only be issued on probable cause, supported by an affidavit naming or describing the person and particularly describing the property and the place to be searched." As this court has held, general statutes regarding the issuance and execution of search warrants are to be strictly construed. Rivers v. State, 406 So.2d 1021, 1022 (Ala. Cr. App.), cert. denied, 406 So.2d 1023 (Ala. 1981).

The search warrant issued in the instant case reads as follows:

"STATE OF ALABAMA

COUNTY OF DALLAS

"TO THE SHERIFF OR DEPUTY SHERIFF OF SAID COUNTY--- GREETINGS:

"Affidavit having been made before me by W. H. Duke, Investigator with the Dallas County Sheriff's Department, Dallas County, Alabama, that he has reason to believe that there is now being concealed certain property in an apartment known as #12G Chanticleer Apartments, Selma, Alabama. The property being concealed is as follows:

"Cocaine, Marijuana and other illegal drugs.

"and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the aforegoing grounds for application for issuance of the search warrant exist.

"You are hereby commanded to search forthwith the residence above described for the property and the persons, if you find the same present serving this warrant and making the search in the daytime and if the property be found there to sieze it, leaving a copy of the warrant as a receipt for the

property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten (10) days of this date, as required by law.

"Dated this the 5th day of June, 1987.

-s- Charles A. Thigpen
JUDGE OF THE DALLAS COUNTY CIRCUIT COURT"

As can be seen from the above, the search warrant contains no descriptions or names of any persons to be searched. The leading case on this issue is Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979). In Ybarra, the United States Supreme Court held that the Fourth and Fourteenth Amendments will not be construed to permit evidence searches of persons who, at the commencement of the search, are on "compact" premises subject to a search warrant, but are not named or described in the warrant, even where the police have a "reasonable be-

lief" that such persons "are connected with" drug trafficking and "may be concealing or carrying away the contraband." 444 U.S. at 94. This court, as well as other courts in this land, is obliged to follow this decision.

Alabama courts, in following the dictates of Ybarra, have held that a warrant to search designated premises will not authorize the search of every individual who happens to be on the premises. Travis v. State, 381 So.2d 97, 101 (Ala. Cr. App. 1979), cert. denied, 381 So.2d 102 (Ala. 1979). Neither does the fact that law enforcement officials have a warrant to search the house of an accused's girl friend authorize a search of the accused simply because of his presence at the place being searched. Denson v. State, 375 So.2d 1275,1276 (Ala. Cr. App.), cert. denied, 375 So.2d 1276 (Ala. 1979). Furthermore, a search

warrant authorizing the search of "each and every person present in or near said mobile home" for drugs has been held "too broad" to pass constitutional muster. Peavy v State, 336 So.2d 199,202 (Ala. Cr. App.), cert. denied. 336 So.2d 202 (Ala. 1976). See also Clenney v. State, 281 Ala. 9, 198 So.2d 293 (1966); C. D. Hauger Co. v. Abramson, 215 Ala. 174, 110 So.2d 152 (1926); C. Gamble, McElroy's Alabama Evidence S334.01(2)(f) (3rd ed. 1977). The warrant issued in the instant case authorized the search of "the residence above described for the property and the persons." Based on Ybarra and the aforementioned Alabama cases, the wording "and the persons" contained in the warrant was too broad to justify the search of appellant's person, since no persons were named or described in the warrant.

Because the search of appellant's person was not justified under the search warrant, we must now decide whether the search of appellant's person falls within one of the exceptions to the warrant requirement. These exceptions are: (1) plain view, (2) consent, (3) incident to a lawful arrest, (4) exigent circumstances coupled with probable cause, and (6) stop and frisk situations. Ex parte Hilley, 484 So.2d 485,488 (Ala.1985); Dixon v. State, 476 So.2d 1236,1238 (Ala. Cr. App. 1985).

In the instant case, law enforcement officials went to the location to be searched -- 12G, Chanticleer Apartments -- and detained appellant and his companion while the premises were searched. Pursuant to the decision in Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), appellant's detention was allowable, even though he was not

named in the warrant. Unlike the situations in Michigan v. Summers, supra, and Martin v. State, 473 So.2d 650 (Ala Cr. App. 1985) (accused neither named nor described in search warrant) however, no drugs or other contraband were found on the premises. Therefore, the search of appellant's person cannot be justified as occurring incident to a lawful arrest. Michigan v. Summers, 452 U.S. 705; Martin v. State, 473 So.2d 651. Neither can appellant's strip search be justified under the exigent circumstances plus probable cause exception which allowed a warrantless search of an individual in Denson v. State, supra, 375 So.2d at 1276. In Denson, the fact that the accused, who was not named or described in the warrant, was talking peculiarly gave police probable cause to believe that he was attempting to swallow a packet of heroin, thus justifying the warrantless

search. Nor can appellant's search be classified as occurring during hot pursuit or other emergency situations, as was the case in Travis v. State, 381 So.2d 101, where the accused, who was not named or described in the warrant, was attempting to flee the scene of the search. As the cocaine was found only after a strip search of the appellant, it obviously cannot fall within the plain view exception. Neither can the search be justified under the consent exception. Finally, appellant's search was far too intrusive to fall within the stop and frisk exception. Brannon v. State, [Ms. 1 Div. 509, February 24, 1989] ____ So.2d ___ (Ala. Cr. App. 1989).

Because the controlling authority of the United States Supreme Court case of Ybarra v. Illinois, supra, we reluctantly hold that the strip search of appellant was not justified under the

search warrant as written, or pursuant to any of the exceptions to the warrant requirement. Accordingly, the cocaine taken from him was due to are suppressed.

The conviction is reversed and the cause is remanded to the circuit court for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

ALL THE JUDGES CONCUR.

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P.O. BOX 351
June 16, 1989

SAM TAYLOR
Presiding Judge
JOHN C. TYSON,III
WILLIAM M. BOWEN, JR.
JOHN PATTERSON
H. WARD MCMILLAN
Judges

MOLLIE JORDAN
Clerk
(205)261-4590

2 Div. 687 Dallas Circuit Court
CC# CC87-187-N

ROBIN DEWAYNE HELMS vs State of Alabama
Appellant Appellee

Dear Sir:

You are hereby notified that on June 16, 1989, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

* * * * *

XXXX Application for rehearing overruled. Rule 39(k). A.R.A.P., MOTION DENIED. No Opinion.
Judgement not final, see Rules 39 and 41, A.R.A.P.
Application for rehaearing returned vor non-compliance with Rule 40, A.R.A.P.
Appeal placed on reheraing ex mero motu.
Certificate of final judgement issued to the circuit clerk.

/s/ Mollie Jordan
CLERK
COURT OF CRIMINAL
APPEALS OF ALABAMA

APPENDIX B

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

September 1, 1989

88-1227

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIOTATI TO THE COURT OF CRIMINAL APPEALS

(Re: Robin Dewayne Helms v. State)

(CCA 2/687 (Dallas CC-87-187-N))

CERTIFICATE OF JUDGEMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

KENNEDY, J. - Hornsby, C.J., Jones, Almon, Shores, Adams, Houston and Steagall, JJ. concur;
Maddox, J., dissents.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instruments(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 1 day of Sept. 1989.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX C

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P.O. BOX 351

SAM TAYLOR
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
JOHN PATTERSON
H. WARD MCMILLAN
Judges

MOLLIE JORDAN
Clerk
(205)261-4590

2 Div. 687 Dallas (CC87-187-N)
ROBIN DEWAYNE HELMS vs State of Alabama
Appellant Appellee

Dear Sir:

You are hereby notified that on September 7, 1989, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

* * * * *

XXXX On Motion of appellee, a stay of sixty (60) days from September 1, 1989, is hereby granted to allow filing of petition for writ of certiorari in the U.S. Supreme Court. The circuit clerk is hereby directed to return to this Court at once the certificate of judgment issued in this cause on September 1, 1989.

/s/ Mollie Jordan
CLERK
COURT OF CRIMINAL
APPEALS OF ALABAMA

APPENDIX D

RELEVENT ALABAMA STATUTES

CODE OF ALABAMA, 1975

TITLE 20

"§ 20-2-25. SAME - LISTING OF CONTROLLED SUBSTANCES.

The controlled substances listed in this section are included in schedule II:

(1) Any of the following substances, except those narcotic drugs listed in other schedules, whether produced directly or indirectly by extraction from substances of vegetable origin or independently by means of chemical synthesis or by combination of extraction and chemical synthesis:....

d. Coca leaves and any salt, compound, derivative or preparation of coca leaves and any salt, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions which do not contain cocaine or ecgonine."

§ 20-2-70. PROHIBITED ACTS A.

(a) Except as authorized by this chapter, any person who possesses...controlled substances enumerated in schedules...II...is guilty of a felony and, upon conviction, for the first offense may be imprisoned for not less than two nor more than 15 years and, in addition may be fined not more than $25,000.00...."

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, hereby certify that on this _____ day of October, 1989, I did serve the requisite number of copies of the forgoing on the Attorney for Robin Dewayne Helms, Respondent, by mailing the same to said Attorney, first class postage prepaid and addressed as follows:

Honorable J. Edmund Odum, Jr.
Attorney at Law
2122 First Avenue, North
Birmingham, Alabama 35203

_____

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

ADDRESS OF COUNSEL:

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Montgomery, Alabama 36130
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